

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

JUNE 15, 2001

IN RE:)	
)	
PETITION OF MCI WORLDCOM, INC. TO)	DOCKET NO.
ENFORCE INTERCONNECTION AGREEMENT)	99-00662
WITH BELL SOUTH TELECOMMUNICATIONS, INC.)	

INITIAL ORDER OF HEARING OFFICER ON THE MERITS

This matter came before the Tennessee Regulatory Authority (the "Authority" or "TRA") for consideration of the Petition (the "Petition") filed by MCI WorldCom, Inc. ("MCI WorldCom") to enforce the Interconnection Agreement (the "Agreement") between MCI metro Access Transmission Services, Inc. ("MCI metro" or "MCI m")¹ and BellSouth Telecommunications, Inc. ("BellSouth" or "BST").

BACKGROUND

MCI WorldCom filed its Petition on September 9, 1999. On December 7, 1999, at a regularly scheduled Authority Conference, the Directors of the Authority unanimously appointed General Counsel or his designee as Hearing Officer to hear this matter on the merits, and an Order reflecting this decision was entered on December 21, 1999.

A Pre-Hearing Conference in this matter was held on March 15, 2000 before the General Counsel acting as Hearing Officer. At this Conference, the Hearing Officer established a schedule for discovery and the filing of testimony. MCI WorldCom, as Petitioner, was instructed to file direct testimony in support of its Petition, to be followed by responsive

¹ MCI metro is an affiliate of MCI WorldCom. See Petition, September 9, 1999, p. 1.

testimony from BellSouth. Final rebuttal testimony could be submitted by MCI WorldCom.

In accordance with the parties' agreed schedule, MCI WorldCom filed the direct testimony of Ron Martinez and Dan Aronson on May 11, 2000. BellSouth filed the rebuttal testimony of Jerry Hendrix and David Scollard on May 18, 2000. MCI WorldCom filed the rebuttal testimony of Mr. Martinez on May 24, 2000. BellSouth propounded interrogatories and a request for production of documents to MCI WorldCom on April 14, 2000. MCI WorldCom responded to BellSouth's discovery requests on May 5, 2000, objecting to certain interrogatories and requests for production. BellSouth filed a Motion to Compel on May 15, 2000 and MCI WorldCom responded to that Motion on May 25, 2000. After attempts to resolve the discovery dispute failed, the Hearing Officer issued an Order issued on September 1, 2000, which granted in part and denied in part BellSouth's Motion to Compel. On September 1, 2000, the Hearing Officer also entered an Order revising the procedural schedule in this matter. MCI WorldCom filed with the Authority its Supplemental Response to BellSouth's Interrogatories and Request for Documents on September 15, 2000.

Following the issuance of the two Orders issued on September 1, 2000, this matter was assigned to Jonathan N. Wike, Authority Counsel, as Hearing Officer on the merits. The revised schedule set October 18 and 19, 2000, as the dates for a hearing and required the parties to submit comments in advance of the hearing dates regarding whether an evidentiary hearing with live testimony was necessary. In response to that Order, MCI WorldCom and BellSouth filed comments on September 22, 2000 regarding the need for an oral hearing in this matter. After reviewing the parties' filings, the Hearing Officer issued an Order on October 5, 2000 determining that live testimony would be necessary in this matter, extending the hearing dates in this matter from October 18 and 19, 2000 to November 8 and 9, 2000, and revising the due date of the parties' post-hearing briefs from September 22, 2000 to November 22, 2000.

On October 10, 2000, BellSouth filed a Motion to Reschedule the Hearing Date in this matter. BellSouth requested that the Hearing Officer reschedule the hearing dates, proposed new hearing dates of November 13 and 14, 2000, and requested that the due date for the parties' post-hearing briefs be rescheduled.

By letter dated October 12, 2000, both parties' counsel informed the Hearing Officer that the cross-examination of witnesses would be conducted through depositions and that the depositions would be introduced into the record as evidence in lieu of cross-examination during the hearing. After discussion by the parties, the Authority notified the parties on November 16, 2000 that a hearing was scheduled for December 7, 2000 and that post-hearing briefs were scheduled to be due on December 15, 2000.

A Hearing was held in this matter on December 7, 2000. In attendance at the Hearing were the following parties:

MCI WorldCom, Inc. – **Henry Walker, Esq.**; 414 Union St., Suite 1600, Nashville, TN 37219

BellSouth Telecommunications, Inc. – **Guy Hicks, Esq.**; 333 Commerce St., Suite 2101, Nashville, TN 37201-3300

During the Hearing, all pre-filed testimony and responses to discovery requests were entered into the record in this matter. At the Hearing, the parties were given the opportunity to place deposition testimony in the record in this matter, in accordance with the parties' agreed statement of October 12, 2000. Notwithstanding the parties' agreed statement, counsel for both parties informed the Hearing Officer at the Hearing that no depositions were taken and, as such no deposition transcripts would be placed in the record. In the absence of deposition or live testimony, the Hearing Officer has relied, pursuant to the agreement of the parties, upon the parties' pre-filed testimony and responses to discovery requests in rendering a decision in this matter.

MCI WorldCom and BellSouth filed post-hearing briefs with the Authority on December 15, 2000. On February 21, 2000, the Authority sent notice to the parties that the Hearing Officer would taking official notice, pursuant to Tenn. Code Ann. § 4-5-313(6), of the entire record in Authority Docket No. 98-00530, *In Re: Complaint of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nation" Provision of the Parties' Interconnection Agreement ("Hyperion")*. Neither party filed objections or comments as to the Authority's Notice.

JURISDICTION OF THE TENNESSEE REGULATORY AUTHORITY

The parties have not contested the Authority's jurisdiction. Indeed, the Agreement specifically acknowledges the Authority's jurisdiction in this matter.² Moreover, both state and federal statutes directly empower the Authority to rule in this matter. Both MCI WorldCom and BellSouth are authorized to provide local exchange services in the State of Tennessee pursuant to certificates issued by the Authority or by the Authority's predecessor agency. MCI WorldCom and BellSouth negotiated the Agreement pursuant to the Telecommunications Act of 1996, particularly 47 U.S.C. §§ 251 and 252, and the Agreement was approved by the Authority pursuant to 47 U.S.C. § 252. Furthermore, the Authority has determined in other similar proceedings that it is empowered to resolve disputes arising out of interconnection agreements.³

² See Interconnection Agreement, April 4, 1997, Part A, p. 19.

³ See *Initial Order of Hearing Officer, In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and For Emergency Relief* (the "Brooks Fiber" Order), TRA Docket No. 98-00118 (April 12, 1998) p. 12; *Initial Order of Hearing Officer on the Merits, Complaint of AVR of Tennessee, L.P. d/b/a Hyperion of Tennessee, L.P. Against BellSouth Telecommunications, Inc. to Enforce Reciprocal Compensation and "Most Favored Nations" Provisions of the Parties' Interconnection Agreement* (the "Hyperion" Order), TRA Docket No. 98-00530 (March 14, 2000) p. 8. See also *Order Affirming the Initial Order of the Hearing Officer*, TRA Docket No. 98-00118 (August 17, 1998) (affirming Brooks Fiber Order); *Order Denying BellSouth's Petition for Appeal and Affirming the Initial Order of the Hearing Officer*, TRA Docket No. 98-00530 (September 22, 2000) (affirming Hyperion Order).

POSITIONS OF THE PARTIES

MCI WorldCom

As stated in MCI WorldCom's Petition, MCImetro and BellSouth signed the Agreement on April 4, 1997, and the Authority approved the Agreement by Order dated May 30, 1997, in TRA Docket No. 97-00445.⁴ The Petition alleges: "The Agreement . . . requires each party to compensate the other for the termination of local exchange traffic. BellSouth, however, has refused to pay MCI WorldCom for handling local calls made to ISPs."⁵ ISPs are Internet service providers.⁶

Section 2.2 of Attachment IV of the Agreement,⁷ entitled "Compensation for Call Traffic Transport and Termination," provides in pertinent part as follows:

2.2.1 The Parties shall bill each other reciprocal compensation at the rates set forth for Local Interconnection in this Agreement and the Order of the TRA. Local Traffic is defined as any telephone call that originates in one exchange and terminates in either the same exchange, or a corresponding Extended Area (EAS) exchange. The terms Exchange and EAS exchanges are defined and specified in Section A3. Of BellSouth's General Subscriber Service Tariff.⁸

MCI WorldCom argues that this provision obligates each party to pay reciprocal compensation to the other party for telecommunications traffic which originates on the first party's system and transits to an ISP on the other party's system.⁹ MCI WorldCom relies on the Authority's decision in *Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief* ("Brooks Fiber"),¹⁰ in which the Authority found that a similar agreement¹¹ obligated the

⁴ Petition, p. 1.

⁵ *Id.*, pp. 1-2.

⁶ See *Southwestern Bell Telephone Co. v. Public Util. Comm'n of Texas*, 208 F.3d 475, 477 (5th Cir. 2000).

⁷ The Agreement, with Attachments, is filed with MCI WorldCom's Petition as Attachment A.

⁸ Agreement, April 4, 1997, Attachment IV, p. 3.

⁹ Petition, pp. 1-2.

¹⁰ Authority Docket No. 98-00118. See *Initial Order* (April 21, 1998); *Final Order* (June 2, 1998).

¹¹ The effective date of the BellSouth-Hyperion interconnection agreement was April 1, 1997. Section I.SS. of that agreement defines "Local Traffic" as "any telephone call that originates in one exchange and terminates in either the same exchange, or an associated Extended Area Service ("EAS") exchange. The terms Exchange, and EAS exchanges are defined and specified in Section A3. of BellSouth's General Subscriber Service Tariff."

parties to pay reciprocal compensation for ISP-bound traffic.

MCI WorldCom further argues that the Federal Communications Commission's ("FCC") February 26, 1999 Ruling¹² (the "Declaratory Ruling") addressing the issue of reciprocal compensation for ISP-bound traffic does not preclude the Authority from again concluding, as it did in *Brooks Fiber*, that the parties are required to pay reciprocal compensation for ISP-bound traffic.¹³ MCI WorldCom points out that although the FCC states in the Declaratory Ruling that "ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate,"¹⁴ the FCC goes on to state that this determination does not interfere with the ability of a state commission to conclude that an interconnection agreement requires payment for ISP-bound traffic should the commission find that the agreement is ambiguous on this issue.¹⁵ MCI WorldCom points to a list of criteria the FCC offered in the Declaratory Ruling which a state commission may use to determine whether the parties intended to make such a requirement.¹⁶

Generally, MCI WorldCom argues that, as specifically stated in the Declaratory Ruling the Authority can, and should, conclude that the parties intended that reciprocal compensation be made for ISP-bound traffic. In other words, notwithstanding anything to the contrary in the Declaratory Ruling, *Brooks Fiber* still stands and the Authority should rely on the reasoning and the results in that case. In support of its position, MCI WorldCom cites decisions by four state commissions in BellSouth's territory that held that interconnection agreements required BellSouth to pay reciprocal compensation for ISP traffic, two of which were handed down after

¹² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689 (1999).

¹³ Petition, p. 3.

¹⁴ Declaratory Ruling, ¶ 1.

¹⁵ Petition, p. 3.

¹⁶ *Id.*

the Declaratory Ruling was issued.¹⁷

Ron Martinez, who was the lead negotiator for MCImetro in the negotiation of the Agreement, testified that the Agreement obligates BellSouth to pay reciprocal compensation to MCI WorldCom for ISP-bound traffic.¹⁸ Mr. Martinez based this assertion on his conclusion that when calls are made to ISPs who are customers of MCImetro, MCImetro “terminates,” as that term is used in the agreement, those calls on its network. Mr. Martinez stated:

A “telephone call” placed over the public switched telephone network is “terminated” when it is delivered to the telephone exchange service premise bearing the called telephone number. As a communications service, a call is completed at that point, regardless of the identity or status of the called party. An internet service provider (“ISP”) that purchases local service from MCImetro is assigned a telephone number by MCImetro for local service at the ISP’s premise. When a BellSouth customer originates a call by dialing that number, as far as MCImetro is concerned that call terminates at the ISP premise, just as any other telephone call. A connection that an ISP may subsequently enable over the internet is between the ISP and its other providers.¹⁹

Mr. Martinez also testified that “more than a dozen state commissions now have ruled that telephone calls to ISPs constitute local traffic that are subject to reciprocal compensation,” and he cited three decisions from state commissions which “have so interpreted the exact language of the exact agreement at issue in this proceeding.”²⁰

¹⁷ *Id.*, p. 3. The decisions are: *In re Request for Arbitration Concerning Complaint of American Communication Services of Jacksonville, Inc., d/b/a e.spire Communications, Inc. and ACSI Local Switched Services, Inc. d/b/a e.spire Communications, Inc. Against BellSouth Communications, Inc. Regarding Reciprocal Compensation for Traffic Terminated to Internet Service Providers*, Docket No. 981008-TP, Order Resolving Complaint (Florida Public Service Commission, April 6, 1999); *In Re: Petitions of ICG Telecom Group, Inc. And ITC Deltacom Communications, Inc. For a Declaratory Ruling*, Alabama Public Service Commission, Docket No. 26619 (March 4, 1999); *In re: Complaint of WorldCom Technologies, Inc. Against BellSouth Telecommunications, Inc. For Breach of Terms of Florida Partial Interconnection Agreement Under Sections 251 and 251 of the Telecommunications Act of 1996 and Request for Relief*, Docket No. 971478-TP, Final Order Resolving Complaints (Florida Public Service Commission, September 15, 1998); *In the Matter of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and MCI WorldCom of North Carolina, L.L.C.*, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, Sub 1027 (North Carolina Utilities Commission, February 26, 1998); and *Complaint of e.spire Communications, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 9281-U, Order Affirming and Modifying the Hearing Officer’s Decision (Georgia Public Service Commission, March 3, 1999).

¹⁸ Direct Testimony of Ronald Martinez, May 11, 2000, pp. 2-3.

¹⁹ *Id.*, pp. 3-4.

²⁰ *Id.*

MCI WorldCom witness Dan Aronson²¹ testified that BellSouth “began in late 1997 to unilaterally withhold approximately 50% of the invoiced reciprocal compensation amounts based on BST’s internal estimate of the portion of the reciprocal compensation invoices it claimed was attributable to calls to ISPs.”²² Mr. Aronson further testified:

Neither BST nor MCImetro can precisely segregate ISP-bound local calls from other local calls. However, BST has not paid MCImetro’s invoices in full, and BST has indicated that it is attempting to avoid paying reciprocal compensation on ISP-bound local traffic.²³

In its Post-Hearing Brief, MCI WorldCom calls attention to the Authority’s Final Order issued on September 22, 2000 in *Hyperion*.²⁴ MCI WorldCom states that the interconnection agreement in *Hyperion*, which was signed within days of the Agreement at issue in this matter, contains identical provisions for payment of reciprocal compensation, including an identical definition of “local traffic.”²⁵ MCI WorldCom argues that “the TRA’s findings of fact and conclusions of law in *Hyperion*,” i.e. the TRA’s finding that the BellSouth-*Hyperion* agreement required BellSouth to pay *Hyperion* reciprocal compensation for ISP-bound traffic, “predetermine, to a substantial degree, the outcome of the present proceeding.”²⁶

MCI WorldCom further states in its Post-Hearing Brief that “there is no doubt that the Agreement at issue in this case requires that BellSouth and MCI WorldCom each pay each other at the same tandem interconnection rate of \$.005/mou. [minute of use]”²⁷ MCI states:

As shown in the attachments to Mr. Aaronson’s [sic] testimony, the TRA-established rates are \$.005 per minute for “interconnection through the BellSouth tandem” and \$0.004 per minute for “direct end office interconnection.” MCI

²¹ Mr. Aronson stated that his duties as director of carrier access billing for MCI WorldCom include responsibility for rendering invoices to BellSouth for reciprocal compensation payments for the termination of local calls from BellSouth customers to customers of MCImetro pursuant to the Agreement. Direct Testimony of Dan Aronson, May 11, 2000, p. 1.

²² *Id.*, p. 3.

²³ *Id.*

²⁴ See *Order Denying BellSouth’s Petition for Appeal and Affirming the Initial Order of Hearing Officer*, Authority Docket No. 98-00530 (September 22, 2000).

²⁵ Post-Hearing Brief of MCI World Com, December 15, 2000, p. 1.

²⁶ *Id.*, p. 1.

²⁷ *Id.*, p. 6.

contends that the applicable rates [sic] in the case is \$.005. Martinez Rebuttal, 3-4. Although BellSouth did not propose a specific rate, witness Hendrix testified that, although MCI WorldCom should pay the higher, tandem rate to BellSouth, BellSouth should pay the smaller, end office rate to MCI WorldCom. Hendrix Rebuttal, 18-23.

Mr. Hendrix's testimony based on his interpretation of an FCC rule does not even mention the provisions of the Agreement itself which states explicitly that "BellSouth shall also pay to MCI a charge symmetrical to its own charges for tandem switching, tandem end-to-end office transport, and end office termination." Martinez Rebuttal, at 3-4.²⁸

BellSouth

BellSouth argues that calls to ISPs do not terminate on MCI's network and that the language of the Agreement shows that the parties did not agree to pay reciprocal compensation for ISP-bound traffic.²⁹ BellSouth finds support for this position in the FCC's conclusions in the Declaratory Ruling, which, according to BellSouth, held that such calls are interstate.³⁰ BellSouth cites decisions of the New Jersey and Massachusetts state utilities commissions and a North Carolina federal district court, all decided after the Declaratory Ruling, in support of its position.³¹

BellSouth points to a provision in the Agreement which obligates the parties to abide by the federal telecommunications laws and FCC rules.³² BellSouth argues that the Declaratory Ruling and other FCC orders show that the FCC had a longstanding practice of treating ISP-bound traffic as interstate, based on the FCC's focus on the "end-to-end nature" of any

²⁸ *Id.*, p. 5.

²⁹ Answer of BellSouth Telecommunications, Inc., September 28, 1999, p. 1.

³⁰ *Id.*

³¹ *Id.*, pp. 1-2.

³² Rebuttal Testimony of Jerry D. Hendrix, May 18, 2000, p. 4. The sixth paragraph of the preamble of the Agreement, to which Mr. Hendrix refers, states:

WHEREAS, the parties intend the rates, terms and conditions of this Agreement, and their performance of obligations thereunder, to comply with the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"), the applicable Rules and Regulations of the Federal Communications Authority ("FCC") in effect, and the orders, rules and regulations of the state regulatory body.

Agreement, April 4, 1997, Part A – 1.

telecommunications traffic; if the parties are to be restrained by federal telecommunications law, BellSouth argues, they also must treat ISP-bound traffic as interstate.³³

BellSouth asserts that it did not consider ISP-bound traffic subject to reciprocal compensation requirements at the time of the Agreement, citing comments it filed with the FCC in April 1997, the same month the Agreement was entered into.³⁴ BellSouth states that the parties never discussed reciprocal compensation for ISP-bound traffic, and therefore there was no “meeting of the minds” on including such traffic in their reciprocal compensation provision.³⁵ BellSouth states that the parties “certainly did not agree that a call is ‘terminated’ when it is delivered to the telephone exchange service premise bearing the called telephone number.”³⁶ There was no need to include specific language in the Agreement excepting ISP-bound traffic from the reciprocal compensation requirements, BellSouth states, because the Agreement already provides that local traffic is traffic that “terminates” in the same exchange or corresponding EAS.³⁷ BellSouth further states that local exchange rates do not take into account or compensate for ISP-bound traffic, which has much higher average call times than other local traffic.³⁸

BellSouth states that MCI WorldCom is incorrect in its conclusions about the termination of a call; “termination,” BellSouth argues, means completion of the call by an end user.³⁹ BellSouth states that MCI WorldCom’s claims are based on the “two-call” theory of ISP-bound traffic, which BellSouth argues has been discredited, citing a United States District Court case from 1944 and the Declaratory Ruling.⁴⁰ BellSouth states that the Authority’s decision in *Brooks*

³³ Rebuttal Testimony of Jerry D. Hendrix, May 18, 2000, pp. 4, 11-12.

³⁴ *Id.*, p. 15.

³⁵ BellSouth Telecommunications, Inc.’s Post-Hearing Brief, December 15, 2000, p. 18.

³⁶ Rebuttal Testimony of Jerry D. Hendrix, May 18, 2000, p. 10.

³⁷ *Id.*, p. 17.

³⁸ *Id.*, p. 14.

³⁹ *Id.*, p. 11.

⁴⁰ BellSouth Telecommunications, Inc.’s Post-Hearing Brief, December 15, 2000, p. 14, relying on *United States v. AT&T*, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), *aff’d sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945).

Fiber is likewise in error because it relies on the “two-call” theory.⁴¹ BellSouth contends that most of the state commission decisions in BellSouth’s territory that deal with the issue of ISP-bound traffic were decided before the Declaratory Ruling and are thus of questionable value.⁴² BellSouth points to an October 28, 1999 ruling of the Louisiana Public Service Commission which “found that the terms of the KMC agreement did not obligate the parties to pay reciprocal compensation.”⁴³

BellSouth acknowledges that in 1983 the FCC exempted enhanced service providers, which include ISPs, from interstate access charges, but argues that this action is the exception that proves the rule.⁴⁴ BellSouth cites a number of past FCC Orders showing FCC treatment of ISP-bound traffic as interstate.⁴⁵ BellSouth also argues that the fact that an ISP uses a local business line does not alter fact that communication to an ISP involves a continuous transmission of signals in which the ISP merely serves as a “conduit.”⁴⁶ BellSouth acknowledges the decision of the D. C. Circuit Court of Appeals vacating the Declaratory Ruling,⁴⁷ but states that the D. C. Circuit did not establish a principle of law regarding ISP-bound traffic.⁴⁸ BellSouth does not address the Authority’s decision in *Hyperion*.

FINDINGS AND CONCLUSIONS

Introduction

Section 251 of the Federal Telecommunications Act of 1996 (the “1996 Act”) imposes upon each telecommunications carrier the duty to interconnect with the facilities and equipment of other carriers. The 1996 Act imposes additional obligations on all carriers, including the

⁴¹ *Id.*, p. 19.

⁴² *Id.*, p. 20.

⁴³ *Id.*, p. 20.

⁴⁴ Rebuttal Testimony of Jerry D. Hendrix, May 18, 2000, pp. 4-5, 12.

⁴⁵ *Id.*, pp. 12-14.

⁴⁶ BellSouth Telecommunications, Inc.’s Post-Hearing Brief, December 15, 2000, p. 4.

⁴⁷ *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D. C. Cir. 2000).

⁴⁸ *Id.*, pp. 17-18.

“duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”⁴⁹ The Agreement between BellSouth and MCImetro contains a provision for reciprocal compensation. The issue in this proceeding is whether this provision requires reciprocal compensation for telecommunications traffic that originates from a customer of one carrier and travels, not simply to another telephone, but to an ISP on the other carrier’s network.

This is not the first time the Authority has been asked to interpret the reciprocal compensation provisions of an interconnection agreement similar to those present in the parties’ Agreement. In its previous decisions in *Brooks Fiber* and *Hyperion*,⁵⁰ the Authority held that these reciprocal compensation provisions demonstrate the parties’ intention to include ISP-bound traffic in their contractual obligations to pay reciprocal compensation for local traffic.⁵¹ MCI WorldCom stakes its case on the reasoning and results in these two cases.

BellSouth seeks to reverse the position taken by the Authority in *Brooks Fiber* and *Hyperion*. In so doing, BellSouth relies heavily on the FCC’s Declaratory Ruling. BellSouth’s argument runs as follows: The Agreement requires reciprocal compensation for the “termination” of “local traffic.” In BellSouth’s view, the Declaratory Ruling represents the FCC’s determination that ISP-bound traffic does not “terminate” at the ISP and is not local. Therefore, BellSouth argues, the Agreement cannot require reciprocal compensation for ISP-bound traffic.

BellSouth’s reliance on the Declaratory Ruling is misplaced for the reasons set forth below. BellSouth has presented a flawed reading of the Declaratory Ruling that does not offer sufficient grounds for deviating from the Authority’s decisions in *Brooks Fiber* and *Hyperion*.

⁴⁹ 47 U.S.C. § 251(b)(5). Reciprocal compensation is the payment by one local exchange carrier to another, where the systems of the two carriers are interconnected, for telecommunications traffic that originates on one (the paying) party’s system and transits to a destination on the other (the paid) party’s system.

⁵⁰ See above, note 3.

⁵¹ The interconnection agreement at issue in *Hyperion* was entered into on April 9, 1997. The Agreement at issue in the present matter was entered into on April 4, 1997.

The Hearing Officer has considered the evidence in the record in this matter, together with the factual findings in the *Brooks Fiber* and *Hyperion* Orders and the opinion of the D. C. Circuit Court of Appeals vacating the Declaratory Ruling, and in light of the criteria set forth in the Declaratory Ruling itself. Such consideration focuses on the language of the Agreement and the FCC's and BellSouth's treatment of ISP-bound traffic, which defined the context in which the Agreement was negotiated and entered into. On this basis, the Hearing Officer concludes that the TRA's decisions in *Brooks Fiber* and *Hyperion* provide precedential authority for determining this case and that the Agreement requires the payment of reciprocal compensation for ISP-bound traffic.

The Authority's Decision in *Brooks Fiber*

In *Brooks Fiber*, the Authority was presented with the issue of reciprocal compensation for ISP-bound traffic with regard to an interconnection agreement substantially similar to the one at issue in this proceeding.⁵² The Authority's decision in *Brooks Fiber* relied, in part, on a series of FCC Orders, dating back several years before the 1996 Act, which showed a consistent treatment of ISP-bound traffic as local traffic. The Hearing Officer in *Brooks Fiber* ruled that "[b]ased upon the long-standing position of the FCC that existed years before the execution of the Interconnection Agreement, . . . the term 'Local Traffic' as used in the reciprocal compensation arrangement of the Interconnection Agreement at issue, includes, as a matter of law, calls to ISPs."⁵³ The Hearing Officer noted that "[a]ll parties agree that the FCC has for many years declared that enhanced service providers, which includes ISPs, may obtain services as end users under intrastate tariffs," and that the "FCC has affirmed this position as recently as

⁵² Article I, Section 1.31 of the interconnection agreement at issue in *Brooks Fiber* defines "Local Traffic" as "any telephone call that originates and terminates in the same LATA and is billed by the originating party as a local call, including any call terminating in an exchange outside of BellSouth's service area with respect to which BellSouth has a mandatory EAS or Wide Area Calling Plan local interconnection arrangement with an independent LEC, with which Brooks is not directly interconnected." See *Brooks Fiber Order*, pp. 16-17.

⁵³ *Brooks Fiber Order*, p. 19.

1997.”⁵⁴ The Hearing Officer’s Order recognized that, in its Report and Order on Universal Service, the FCC

once again reaffirms its long-standing position that enhanced service providers are treated as end users and obtain services from incumbent LECs under the same intrastate tariffs in a manner indistinguishable from any other end user. The FCC, additionally, makes it clear that an end user’s call to an ISP is the only telecommunications service taking place. The FCC is careful and unmistakable in distinguishing a subscriber’s connection to an ISP from the ISP’s service offering as a provider of information. In fact, BST’s position that a call from an end user to an ISP “only transits through the ISP’s local point of presence; it does not terminate there” may or may not accurately recognize that some form of analog or digital processing activity continues to take place after the telecommunications service, as defined by the FCC has terminated at the ISP. Even so, that has little to do with the focus of attention in this cause. The fact that an ISP launches an information service after being connected with via a telecommunications service is if no import in this analysis.⁵⁵

In light of the FCC Orders it cites, the *Brooks Fiber Order* concludes that

As stated, the call, which is, in fact, the telecommunications service, ends or terminates, by law, at the ISP. The information service provided by the ISP is not a call, in the sense that it is not, as a matter of law, a telecommunications service.⁵⁶

The Authority’s Decision in *Hyperion*

In *Hyperion*, the Authority was again presented with facts and issues similar to those in this case. Unlike *Brooks Fiber*, *Hyperion* was decided after the FCC’s Declaratory Ruling. In *Hyperion*, the Hearing Officer concluded that the FCC’s Declaratory Ruling does not establish a rigid rule that ISP traffic must not be treated as local traffic when determining whether reciprocal compensation payments must be paid pursuant to an interconnection agreement.⁵⁷ Rather, the Hearing Officer concluded, on the basis of the express language of the Declaratory Ruling, that

⁵⁴ *Id.*, p. 17, citing *In the Matter of MTS and WATS Market Structure, Memorandum and Order*, CC Docket No. 79-72, 97 FCC 2d 682 (1983); *In the Matter of Amendments to Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd 2631, CC Docket No. 87-215 (April 17, 1988); *In the Matter of Access Charge Reform, First Report and Order*, CC Docket No. 92-262, May 17, 1997, Part IV.B.

⁵⁵ *Id.*, p. 18.

⁵⁶ *Id.*, p. 19.

⁵⁷ *Hyperion Order*, p. 18.

the Authority was not only permitted, but obligated, to determine whether the parties intended in their interconnection agreement to require reciprocal compensation for ISP-bound traffic.⁵⁸ Based upon the language of the agreement and the record before him, the Hearing Officer determined that the agreement required BellSouth to pay Hyperion for ISP traffic.

The FCC's Declaratory Ruling

Contrary to BellSouth's percussive treatment of it, the FCC's Declaratory Ruling does not cast doubt on the Authority's decision in *Hyperion* or even on the Authority's decision in *Brooks Fiber*. The Declaratory Ruling represents an obvious shift in the FCC's thinking away from FCC Orders upon which the Hearing Officer relied in *Brooks Fiber* to conclude that the FCC had an extensive history of viewing ISP-bound traffic as local traffic leading up to the Declaratory Ruling. Nevertheless, as the D.C. Circuit Court of Appeals stated in vacating and remanding the Declaratory Ruling to the FCC, that shift is far from convincing and is undermined by the FCC's longstanding treatment, in prominent circumstances, of ISP-bound traffic as local traffic.⁵⁹

The D. C. Circuit found the Declaratory Ruling to be an unconvincing disavowal of the FCC's position, not a persuasive clarification of some isolated deviations from an alleged FCC position treating ISP-bound traffic as interstate. The D. C. Circuit cites the same FCC Orders the Hearing Officer relied upon in *Brooks Fiber*.⁶⁰ In the Court's words, the FCC's classification of ESPs, of which ISPs are a subset, reflected in these previous Orders "is something of an embarrassment to the Commission's present ruling."⁶¹ The Court stated that

[w]hen accused of inconsistency in the present matter, the Commission flipped the argument on its head, arguing that its exemption of ESPs from access charges actually confirms "its understanding that ESPs in fact use interstate access service; otherwise, the exemption would not be necessary." FCC Ruling, 14 FCC

⁵⁸ *Id.*

⁵⁹ See *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (D. C. Cir. 2000).

⁶⁰ See *Bell Atlantic*, 206 F.3d at 7; *Brooks Fiber Order*, p. 17.

⁶¹ See *Bell Atlantic*, 206 F.3d at 8.

Rcd at 3700 (¶ 16). This is not very compelling. Although, to be sure, the Commission used policy arguments to justify the “exemption,” it also rested on an acknowledgement of the real differences between long-distance calls and calls to information service providers. It is obscure why those have now dropped out of the picture.⁶²

BellSouth echoes the FCC’s attempt to downplay the importance of the access-charge exemption for ESPs. In the Court’s words, this is an “embarrassment” to BellSouth’s position as well.

To a great degree, BellSouth relies on the Declaratory Ruling as a conclusive statement that ISP-bound traffic is by nature interstate and does not terminate locally to support the position that the parties’ reference to “termination” in defining their reciprocal compensation obligations could not include ISP-bound traffic. This reliance is misplaced. As the D. C. Circuit explained, the FCC may have made a colorable argument on the question of “jurisdiction” of ISP-bound traffic, but it failed to make a persuasive case as to the termination of such traffic. According to the D. C. Circuit, the FCC’s own definition of “termination”⁶³ tempts one to conclude that a call to an ISP terminates at the ISP. The FCC sought to avoid this conclusion through its “end-to-end” analysis, but the D. C. Circuit found this approach unconvincing. In a passage that completely unravels the FCC’s reasoning as well as BellSouth’s arguments based on the Declaratory Ruling, the Court stated:

In this regard an ISP appears, as MCI WorldCom argued, no different from many businesses, such as “pizza delivery firms, travel reservation agencies, credit card verification firms, or taxicab companies,” which use a variety of communications

⁶² *Id.*

⁶³ *Cf. Southwestern Bell Tel. Co. v. Public Util. Comm’n of Texas*, 208 F.3d 475, 486 (5th Cir. 2000), in which the Fifth Circuit Court of Appeals stated:

A 1996 FCC Report defined “termination” for purposes of section 251(b)(5), as “the switching of traffic that is subject to section 251(b)(5) at the terminating carrier’s end office switch (or equivalent facility) and delivery of that traffic from that switch to the called party’s premises.” Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15,499 ¶ 1040, 1996 WL 452885 (1996), *aff’d in part, vacated in part on other grounds, Iowa Utils. Bd.*, 120 F.3d 753. As for the modem calls here at issue, the ISPs are Time Warner’s customers, making Time Warner [analogous in this case to MCImetro] the terminating carrier. So, under the foregoing definition, “termination” occurs when Time Warner switches the call at its facility and delivers the call to “the called party’s premises,” which is the ISP’s local facility. Under this usage, the call indeed “terminates” at the ISP’s premises.

services to provide their goods or services to their customers. Comments of WorldCom, Inc. at 7 (July 17, 1997). Of course, the ISP's origination of telecommunications as a result of the user's call is instantaneous (although perhaps no more so than a credit card verification system or a bank account information service). But this does not imply that the original communication does not "terminate" at the ISP. The Commission has not satisfactorily explained why an ISP is not, for purposes of reciprocal compensation, "simply a communications-intensive business end user selling a product to other consumer and business end-users." *Id.*⁶⁴

In other words, as the D. C. Circuit stated, "the mere fact that the ISP originates further telecommunications does not imply that the original telecommunication does not "terminate" at the ISP."⁶⁵ The Court concluded that "[h]owever sound the end-to-end analysis may be for jurisdictional purposes, the Commission has not explained why viewing these linked telecommunications as continuous works for purposes of reciprocal compensation."⁶⁶

BellSouth, in this case, relies on the FCC's Declaratory Ruling although it has been vacated, and despite the serious questions the Court of Appeals has raised about its theoretical foundations. Moreover, the Declaratory Ruling simply does not do or even purport to do what BellSouth claims it does. Contrary to BellSouth's reading, the Declaratory Ruling, by its own clear terms, in no way prohibits a conclusion that the parties to the Agreement are obligated to pay reciprocal compensation for ISP-bound traffic. The Declaratory Ruling very explicitly states that it does not create a rule prohibiting payment of reciprocal compensation for ISP-bound traffic.⁶⁷ Instead, the Declaratory Ruling specifically provides that state commissions, in their role of interpreting interconnection agreements, may find that the parties to such agreements intended to include ISP-traffic in their reciprocal compensation obligations.⁶⁸

While the Declaratory Ruling does conclude, as BellSouth points out, that "ISP traffic is

⁶⁴ *Bell Atlantic*, 206 F.3d. at 7.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ "The Commission has no rule governing inter-carrier compensation for ISP-bound traffic." Declaratory Ruling, ¶ 9.

⁶⁸ Declaratory Ruling, ¶¶ 1, 22.

jurisdictionally mixed and appears to be largely interstate,”⁶⁹ the FCC makes the following qualification:

This conclusion, however, does not in itself determine whether reciprocal compensation is due in any particular instance. As explained below, parties may have agreed to reciprocal compensation for ISP-bound traffic, or a state commission, in the exercise of its authority to arbitrate interconnection disputes under section 252 of the Act, may have imposed reciprocal compensation obligations for this traffic. In the absence, to date, of a federal rule regarding the appropriate inter-carrier compensation for this traffic, we therefore conclude that parties should be bound by their existing interconnection agreements, as determined by state commissions.⁷⁰

The Declaratory Ruling further states:

Currently, the Commission has no rule governing inter-carrier compensation for ISP-bound traffic. In the absence of such a rule, parties may voluntarily include this traffic within the scope of their interconnection agreements under sections 251 and 252 of the Act, even if these statutory provisions do not apply as a matter of law. Where parties have agreed to include this traffic within their 251 and 252 interconnection agreements, they are bound by those agreements, as interpreted and enforced by the state commissions.⁷¹

The FCC then concedes that the FCC has itself historically treated ISP-bound traffic as local—hence the need for a Declaratory Ruling setting forth the FCC’s new position, which is contradictory to the FCC’s longstanding practice with regard to ISPs—and that under the circumstances parties to interconnection agreements may reasonably have assumed that ISP traffic should be treated as local. The Declaratory Ruling makes this very clear:

While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the context of reciprocal compensation, suggest that such compensation is due for that traffic.⁷²

⁶⁹ *Id.*, ¶ 1.

⁷⁰ *Id.*

⁷¹ As the Hearing Officer stated in *Hyperion*,

The underlying relevant question to be asked and answered, for the purposes of this decision, is not whether there exists a rule that forces payment of reciprocal compensation for ISP-bound traffic; but, whether under the Agreement, given the regulatory landscape that existed at that time, the parties agree that ISP-bound traffic should be treated as local traffic for purposes of payment of reciprocal compensation.

Hyperion Order, p. 18.

⁷² Declaratory Ruling, ¶ 25.

The Declaratory Ruling explains the FCC's past treatment of ISP-bound traffic as local as follows:

Since [1983], the Commission has maintained the ESP exemption, pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes.

Against this backdrop, and in the absence of any contrary Commission rule, parties entering into interconnection agreements may reasonably have agreed, for the purposes of determining whether reciprocal compensation should apply to ISP-bound traffic, that such traffic should be treated in the same manner as local traffic.⁷³

The Declaratory Ruling then sets forth several factors a state commission may, but is not required to, use in determining whether the parties intended to include ISP-bound traffic in their reciprocal compensation obligations as the state commission takes “the opportunity to consider all the relevant facts, including the negotiation of the agreements in the context of this Commission’s longstanding policy of treating this traffic as local.”⁷⁴ These factors are:

Whether incumbent LECs serving ESPs (including ISPs) have done so out of intrastate or interstate tariffs; whether revenues associated with those services were counted as intrastate or interstate revenues; whether there is evidence that incumbent LECs or CLECs made any effort to meter this traffic or otherwise segregate it from local traffic, particularly for the purpose of billing one another for reciprocal compensation; whether, in jurisdictions where incumbent LECs bill their end users by message units, incumbent LECs have included calls to ISPs in local telephone charges; and whether, if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic.⁷⁵

The Declaratory Ruling states that “[t]hese factors are illustrative only; state commissions, not this Commission, are the arbiters of what factors are relevant in ascertaining the parties’

⁷³ *Id.*, ¶¶ 23-24.

⁷⁴ *Id.*, ¶ 24.

⁷⁵ *Id.*

intentions.”⁷⁶

It could not be any clearer from these passages that the Declaratory Ruling just does not do what BellSouth claims it does. Rather, the Declaratory Ruling explicitly maintains the issues as the parties themselves have stated in this proceeding⁷⁷ as a matter for determination by the state commission and even lends some factual support for a determination that parties to interconnection agreements, especially agreements entered into before the FCC’s Declaratory Ruling, would reasonably have intended to treat ISP-bound traffic as local and thus require reciprocal compensation for it.⁷⁸

The cases cited by BellSouth in its Answer do not stand in the way of this conclusion. Although these cases recognize and seek to apply the FCC’s holding in its Declaratory Ruling that ISP traffic is “jurisdictionally mixed and appears to be largely interstate” and the FCC’s statements discrediting the two-call theory, these cases also recognize, as they must, that the FCC expressly deferred to determinations by the state commissions as to whether the parties to interconnections agreements did or did not intend that reciprocal compensation would be paid for ISP traffic.

In its Answer, BellSouth relied upon a New Jersey case, *In re Global NAPS, Inc.*,⁷⁹ which differs from the present case in the timing of the commission’s decision. The FCC issued its

⁷⁶ *Id.*

⁷⁷ BellSouth defines the single issue in this proceeding as
Whether BellSouth Telecommunications, Inc. and MCI WorldCom mutually agreed to pay reciprocal compensation for traffic to Internet Service Providers under their interconnection agreement?

BellSouth Telecommunications, Inc.’s List of Issues, March 10, 2000. Here BellSouth is consistent with the Declaratory Ruling.

⁷⁸ The Declaratory Ruling does not set forth a rule foreclosing an interpretation that requires payment of reciprocal compensation for ISP-bound traffic, and the effect of both the Declaratory Ruling and the D. C. Circuit decision vacating it is that federal law does not prohibit such payment. Thus, there is no merit to BellSouth’s argument that an interpretation of the Agreement that requires payment of reciprocal compensation for ISP-bound traffic is contrary to federal law, for such is the state of federal law now and such was the state of federal law at the time of the Agreement. See *Hyperion Order*, p. 15, n. 31: “As Mr. Martin [witness for BellSouth] acknowledged, there was no statute, rule or regulation in effect in April 1997 that required the payment of reciprocal compensation for ISP-bound traffic.”

⁷⁹ *In re Global NAPS, Inc.*, New Jersey Board of Public Utilities, July 12, 1999, 1999 WL 667496.

Declaratory Ruling before the arbitration at issue in the New Jersey case was completed. In the absence of an interconnection agreement embodying the parties' intentions as to ISP traffic, the New Jersey Board held that the FCC's pronouncements on ISP traffic dictated that the interconnection agreement under arbitration could not be held to treat ISP traffic as local. The Board acknowledged and did not dispute the FCC's statement that "parties should be bound by their existing interconnection agreements, as interpreted by state commissions."⁸⁰

BellSouth also cited a Massachusetts case, *MCI WorldCom, Inc. v. New England Telephone and Telegraph Company dba Bell Atlantic-Massachusetts*,⁸¹ which relied on the FCC's Declaratory Ruling. The fact that this case does not support BellSouth's position in this instance is made clear in the opening lines of the Massachusetts commission's opinion:

The FCC's 'one call' ruling effectively undercut the jurisdictional claim of any state utility regulatory agency over ISP-bound traffic, insofar as an agency asserted that calls to Internet websites were severable into two components: (1) one call terminating at the ISP and (2) a subsequent call connecting the ISP and the target Internet website. The FCC did not judge state regulators' decision[s] that rested on other bases, apart from noting that decisions resting on state contract law or other legal or equitable considerations 'might' still be valid until the FCC issued a final rule on the matter.⁸²

The federal district court case cited by BellSouth, *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*,⁸³ does not support BellSouth's position that the agreement at issue here cannot be held to require payment for ISP bound traffic. The case does outline the state of the law following the FCC's Declaratory Ruling:

While the FCC Declaratory Ruling did determine that calls to ISPs are largely interstate, the FCC emphasized that this decision did not "interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic. . . ." [Declaratory Ruling] at ¶ 21. The FCC noted that parties may have agreed to treat ISP-bound traffic as

⁸⁰ 1999 WL 667496, at *7 (quoting Declaratory Ruling, ¶ 1).

⁸¹ *MCI WorldCom, Inc. v. New England Telephone and Telegraph Company dba Bell Atlantic-Massachusetts*, Massachusetts Department of Telecommunications and Energy, May 26, 1999, 1999 WL 634357.

⁸² 1999 WL 634357, at *1.

⁸³ *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, Inc.*, 1999 WL 1940043 (W.D.N.C.).

subject to reciprocal compensation and that “[w]here parties have agreed to include this traffic within their . . . interconnection agreements, they are bound by those agreements, as interpreted and enforced by state commissions.” *Id.* at ¶ 22-23. The FCC listed several factors that state commissions may, but are not required, to consider when construing the parties’ agreements to determine whether the parties agreed to treat ISP-bound traffic as local. *Id.* at ¶ 24.⁸⁴

The district court did not, therefore, hold that the Declaratory Ruling requires state commissions to treat ISP-bound traffic as interstate. The court simply remanded the dispute to the North Carolina Utilities Commission for reconsideration in light of the Declaratory Ruling, i.e. in light of the recommended factors.⁸⁵

Finally, the Louisiana Public Service Commission case *BellSouth* cites in its Post-Hearing Brief, *KMC Telecom, Inc. v. BellSouth Telecommunications, Inc.*,⁸⁶ although at variance with the Hearing Officer’s decision here, does not disturb the conclusion that the FCC’s Declaratory Ruling leaves to the state commission the determination whether a particular interconnection agreement requires reciprocal compensation for ISP-bound traffic. As the Louisiana Commission stated:

In its ruling, however, the FCC did not in itself determine whether reciprocal compensation is due in any particular instance. Rather, the FCC held that the parties should be bound by their existing interconnection agreements, as interpreted by state commissions. It found no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a federal rule establishing an appropriate interstate compensation mechanism.⁸⁷

The Parties’ Intention as Determined from the Language of the Agreement and the Prevailing Treatment of ISP-Bound Traffic

Having thus concluded that the Declaratory Ruling does not dictate the conclusion that ISP-bound traffic must be excluded from reciprocal compensation, but if anything provides some

⁸⁴ *Id.*, at *3.

⁸⁵ *Id.*, at *4.

⁸⁶ *Order No. U-23839, KMC Telecom, Inc. v. BellSouth Telecommunications, Inc.*, Louisiana Public Service Commission, October 28, 1999 (attached to BellSouth Telecommunications, Inc.’s Post-Hearing Brief, December 15, 2000).

⁸⁷ *Id.*, at p. 14.

factual support for the opposite conclusion, the Hearing Officer further determines, on the basis of the evidentiary record in this proceeding and in *Hyperion*, that the Agreement reflects the parties' intention to include ISP-bound traffic in their reciprocal compensation obligations for local traffic.⁸⁸

The Agreement provides in Section 2.2.1 of Attachment IV that reciprocal compensation shall be paid for local traffic, which is defined as "any telephone call that originates in one exchange and terminates in either the same, or a corresponding Extended Area (EAS) exchange," as those terms are defined in BellSouth's General Subscriber Services Tariff ("GSST"). The Agreement does not otherwise define or explain "local traffic." The Agreement does not specifically mention ISP-bound traffic. Nor does it define "terminates" in a way that would shed light on whether the parties intended to include or exclude ISP-bound traffic from local traffic for reciprocal compensation purposes.

In the absence of specific guidance on this issue in the Agreement, the Hearing Officer must first determine whether the general language of the Agreement answers the question of reciprocal compensation for ISP-bound traffic. In the *Hyperion Order*, an examination of BellSouth's GSST supported the conclusion that the terms of the Agreement are consistent with the inclusion of ISP-bound traffic.⁸⁹ As the *Hyperion Order* notes, the definition of "local traffic" in the BellSouth-Hyperion agreement, which is identical to the Agreement at issue here,

⁸⁸ Under Tennessee law, "the purpose of interpreting a written contract is to ascertain and to give effect to the contracting parties' intention." *Marshall v. Jackson & Jones Oils, Inc.*, 20 S.W.3d 678, 681 (Tenn. App. 1999); accord, *Frizzell Construction Co., Inc. v. Gatlinburg, L.L.C.*, 9 S.W.3d 79, 85 (Tenn. 1999), cert. denied, 530 U.S. 1238, 120 S.Ct. 2679, 147 L.Ed.2d 289 (2000). "Intention or meaning in a contract may be manifested or conveyed either expressly or impliedly." 17 Am.Jur.2d Contracts § 255 (1964) at 649, quoted in *Hamblen County v. City of Morristown*, 656 S.W.2d 331, 334 (Tenn. 1983). The parties' intention is to be determined in light of "the circumstances in which the contract was made." *Marshall*, 20 S.W.3d at 681; *Frizzell Construction*, 9 S.W.3d at 85. Where a contract is silent or ambiguous as to a particular issue, it is permissible to consider factors external to the language of the contract, particularly the prevailing understanding of words and concepts as it can be derived from industry custom. *First Am. Nat'l Bank of Nashville v. Hunter*, 581 S.W.2d 655, 659 (Tenn. App. 1978); *Park Nat'l Bank v. Goolsby*, 164 S.W.2d 545, 546 (Tenn. 1942).

⁸⁹ *Hyperion Order*, p. 19.

refers to BellSouth's GSST.⁹⁰ "Local Service" is defined in BellSouth's GSST as "[a] type of localized calling whereby a subscriber can complete calls from his station to other stations within a specified area without the payment of long distance charges."⁹¹ As the *Hyperion Order* states, "[n]o party argues that BellSouth's end-users cannot reach ISPs without the payment of long distance charges."⁹² The *Hyperion Order* then notes that BellSouth's GSST defines a "completed call" as "a calling attempt by the subscriber that results in an 'off hook' condition at the receiving end."⁹³ The *Hyperion Order* concludes that "it is seemingly clear from the language in BellSouth's GSST that a subscriber has placed a 'local[] call[]' (utilized local service) if a call can be placed 'without the payment of long distance charges' that results in an 'off hook' condition at the receiving end."⁹⁴ The *Hyperion Order* refers to the definition of "answer supervision" in BellSouth's GSST:

This feature provides the capability of delivering "off hook" supervision signals from the subscriber's serving central office to a line interface at the customer's premises. These supervisory signals indicate when the called party has answered an incoming call (gone "off hook").⁹⁵

The question boils down, in the view of the Hearing Officer in *Hyperion*, to whether an "off hook" condition applies to calls to ISPs. The *Hyperion Order* cites the unchallenged testimony of David Martin on behalf of Hyperion:

BellSouth cannot dispute that Hyperion delivers the call from the BellSouth originating end-user to the telephone exchange of the ISP bearing the called telephone number and when the call reaches the ISP, it is "answered" and answer supervision is returned. By long-established industry practice, the call is considered to have been terminated at the ISP and the FCC's jurisdictional determination does not change this result.⁹⁶

⁹⁰ *Id.*

⁹¹ *Id.*, p. 20.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*, p. 21.

In view of this testimony and the definitions cited from BellSouth's GSST, of which BellSouth was presumably aware, as well as the FCC's longstanding practice of treating ISP-bound traffic as local, the Hearing Officer in *Hyperion* concluded that BellSouth should have included specific language excluding ISP-bound traffic from the reciprocal compensation provisions of the BellSouth-Hyperion agreement had it wished the agreement to have this effect.

The conclusions drawn in the *Hyperion Order* are persuasive on this point. Contrary to BellSouth's assertions, given the FCC's practice at the time of the BellSouth-Hyperion agreement as well as the Agreement at issue here, and given the wording of the relevant portions of BellSouth's own GSST, it is reasonable to conclude that both parties were aware that ISP-bound traffic was customarily treated as local, that BellSouth's own practices and written policies supported such a treatment, and that the definition of "local traffic" in the Agreement would invite a conclusion that the definition included ISP-bound traffic in the absence of express language creating an exception for such traffic. Therefore, the conclusion must be drawn that the parties intended to include ISP-traffic in their reciprocal compensation obligations under the Agreement at issue here, for the same reasons stated in the *Hyperion Order*.

The evidence regarding the factors the FCC listed in its Declaratory Ruling favors this conclusion. BellSouth admits billing its own ISP customers from intrastate tariffs and treating revenues and expenses associated with ESP traffic as intrastate.⁹⁷ BellSouth further admits that it handles all calls to ESPs pursuant to its intrastate tariffs for billing purposes.⁹⁸ BellSouth admits that it counts revenues collected from ESPs as intrastate.⁹⁹ BellSouth states that it has customers who are billed by message units, but states that information on whether calls to ESPs

⁹⁷ BellSouth Response to MCI WorldCom's First Interrogatories, April 14, 2000, Item No. 3, p. 1; Item No. 4, p. 1.

⁹⁸ *Id.*, Item No. 5, p. 1. BellSouth's protestations that it does so because of FCC requirements do nothing to alter the matter. The FCC listed these factors without reference to whether they are required or not. The fact that they may be FCC requirements suggests that there was all the more need for the parties to include specific language in the Agreement excepting ISP-bound traffic from reciprocal compensation.

⁹⁹ *Id.*

by such customers would be included in local telephone charges “is not readily available”; BellSouth disputes whether such customers would make many calls to ESPs.¹⁰⁰ BellSouth does not adequately explain how “if ISP traffic is not treated as local and subject to reciprocal compensation, incumbent LECs and CLECs would be compensated for this traffic,”¹⁰¹ except to argue that the CLEC is compensated through access charges paid by the ISP. This merely reiterates BellSouth’s argument that ISP-bound traffic is not local and does not sufficiently address the FCC’s factor.

BellSouth does state that it “has made considerable efforts to identify minutes of use to BellSouth ISP customers in order to ensure that it did not bill any CLEC reciprocal compensation for ISP traffic.”¹⁰² BellSouth describes a process begun in 1995 and another “formal process” begun in January 1997, both designed, according to BellSouth, to segregate ISP from what it terms “local” traffic.¹⁰³ On balance, however, this does not alter the conclusion that the FCC’s factors favor a finding that the parties intended reciprocal compensation to include ISP-bound traffic.

In the *Hyperion* proceeding, Hyperion witness David Martin testified that “the FCC and parties here [Hyperion and BellSouth] all treated calls to ISPs as local for all regulatory purposes for over 16 years,” including the time the BellSouth-Hyperion agreement was negotiated. Mr. Martin cited the following factors:

First, BellSouth and Hyperion both provide services to ISPs, as they do to all other businesses, out of their local tariffs.

Second, when a BellSouth telephone exchange service customer places a call to an ISP within the caller’s local calling area, BellSouth rates and bills such customer for a local call pursuant to the terms of BellSouth’s local tariff.

Third, In [sic] its required filings with the FCC, BellSouth treats the calling traffic originating on its network and terminating at an ISP within the originating caller’s local calling area, whether the ISP is on BellSouth’s or on an

¹⁰⁰ *Id.*, Item No. 6, p. 1.

¹⁰¹ Declaratory Ruling, ¶ 24.

¹⁰² BellSouth Response to MCI WorldCom’s First Interrogatories, April 14, 2000, Item. No.7, p. 1.

¹⁰³ *Id.*

CLEC's network, as a local call for the purposes of jurisdictional separations and ARMIS reports.

Fourth, BellSouth treats the revenues associated with the calling traffic as local for the purposes of separations and ARMIS reporting.

Fifth, customers of BellSouth and Hyperion generally reach their ISPs by dialing a seven or ten digit local telephone number.¹⁰⁴

Mr. Martin further testified:

BellSouth can not dispute that Hyperion delivers the call from the BellSouth originating end-user to the telephone exchange service of the ISP bearing the called telephone number and when the call reaches the ISP, it is "answered" and answer supervision is returned. By long-established industry practice, the call is considered to have been terminated at the ISP. . . .¹⁰⁵

This testimony is consistent with and reinforces what has been said regarding BellSouth's treatment of ISP-bound traffic as local traffic, and it further supports the conclusion that the parties intended to include ISP-bound traffic in their reciprocal compensation obligations.

Therefore, consistent with the Authority's decisions in *Brooks Fiber* and *Hyperion*, and with the Declaratory Ruling, the Hearing Officer concludes upon review of the Petition and of the entire record in this matter, that the Agreement requires the payment of reciprocal compensation for ISP-bound traffic.

The Appropriate Reciprocal Compensation Rate

Section 2.4.1 of the Agreement states that "when calls from MCIIm are terminating on BellSouth's network through the BellSouth tandem, MCIIm will pay to BellSouth dedicated transport. MCIIm shall also pay a charge for tandem switching, dedicated or common transport to the end office (with mileage calculated as the weighted average of all end offices subtending that tandem), and end-office termination."¹⁰⁶ Section 2.4.2 states that "when BellSouth terminates calls to MCIIm's subscribers using MCIIm's switch, BellSouth shall pay to MCIIm dedicated transport charges from the IP to the MCI Switching Center for dedicated or common

¹⁰⁴ Direct Testimony of David Martin, Docket No. 98-00530, April 8, 1999, pp. 11-12.

¹⁰⁵ Rebuttal Testimony of David Martin, Docket No. 98-00530, April 15, 1999, p. 2.

¹⁰⁶ Agreement, April 4, 1997, Attachment IV, p. 4.

transport. BellSouth shall also pay to MCI a charge symmetrical to its own charges for tandem switching, tandem-to-end-office transport, and end office termination as identified in Section 2.4.1.”¹⁰⁷

While the Hearing Officer agrees that a symmetrical rate should be paid, the Hearing Officer views symmetrical rates, in accordance with the FCC’s rules,¹⁰⁸ as rates that one carrier assesses from another carrier for the transport and termination of telecommunications traffic equal to the rates the other carrier assesses from itself for the “same services.” Therefore, MCImetro’s network would have to perform functions similar to those performed by BellSouth tandem switches to be considered symmetrical and to receive the tandem rate for reciprocal compensation. The Agreement includes rates that were agreed upon for interconnection through the BellSouth tandem at \$.005 per minute and direct end office interconnection rates of \$.004 per minute. However, the Hearing Officer has found nothing in any of the direct or rebuttal testimony or in the post-hearing briefs from MCI WorldCom to support the notion that MCImetro’s network performs functions similar to BellSouth’s tandem functions or actually switches traffic on a tandem basis.

Additionally, the FCC has stated¹⁰⁹ that where the interconnecting carrier’s switch serves a geographic area comparable to that served by the incumbent LEC’s tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC’s tandem interconnection rate. Therefore, MCImetro must meet two requirements in order to be compensated at the same tandem interconnection rate as BellSouth: (1) MCImetro’s network must perform functions similar to those performed by BellSouth’s tandem switch; and (2)

¹⁰⁷ *Id.*

¹⁰⁸ Symmetrical Reciprocal Compensation, 47 C.F.R. § 51.711 (1997).

¹⁰⁹ *First Report and Order*, CC Docket 96-98, ¶ 1090 (Aug. 6, 1996).

MCImetro's switch must serve a geographic area comparable to BellSouth's. MCIWorldCom has not provided any support for either of these requirements.

Because symmetrical compensation means that the same rate should be applied only when like functions are performed, BellSouth shall pay MCImetro reciprocal compensation for all ISP-bound and other local traffic at the switching rate applicable to the switching actually performed. In short, if MCImetro has switched traffic for BellSouth using tandem switches, the rate should be at the tandem switching rate; however, if the switching has been performed using only direct end office switches, then the direct end office rate should apply. It should be noted, however, that MCI WorldCom did not provide evidence in this proceeding that MCImetro's network actually performs functions similar to those performed by BellSouth's tandem switch or that MCImetro's switch serves a geographic area comparable to BellSouth's tandem.

Payment of Unpaid Reciprocal Compensation

MCI WorldCom witness Mr. Aronson testified that BellSouth "began in late 1997 to unilaterally withhold approximately 50% of the invoiced reciprocal compensation amounts based on BST's internal estimate of the portion of the reciprocal compensation invoices it claimed was attributable to calls to ISPs."¹¹⁰ Having determined that the Agreement requires the parties to pay reciprocal compensation for ISP-bound traffic, BellSouth shall refund MCImetro for any invoiced reciprocal compensation that BellSouth has withheld.

In reaching the decisions embodied in this Order, the Hearing Officer recognizes the implications of the FCC's *Order on Remand and Report and Order* (the "Order on Remand"), released on April 27, 2001,¹¹¹ in which the FCC responds to the D.C. Circuit's decision vacating and remanding the Declaratory Ruling. In the Order on Remand, the FCC "impose[s] an interim

¹¹⁰ Direct Testimony of Dan Aronson, May 11, 2000, p. 3.

¹¹¹ *Order on Remand and Report and Order*, CC Docket No. 96-98 and CC Docket No. 99-68, April 27, 2001.

intercarrier compensation regime for ISP-bound traffic” that involves a “36-month transition towards a complete bill and keep recovery mechanism while retaining the ability to adopt an alternative mechanism.”¹¹² The interim regime operates through a “gradually declining cap on the amount that carriers may recover from other carriers for delivering ISP-bound traffic” and a cap on “the amount of traffic for which any such compensation is owed.”¹¹³

As to state commission decisions regarding reciprocal compensation for ISP-bound traffic, the Order on Remand states:

The interim compensation regime we establish here applies as carriers re-negotiate expired or expiring interconnection agreements. It does not alter existing contractual obligations, except to the extent that parties are entitled to invoke contractual change-of-law provisions. This Order does not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here.¹¹⁴

The Order on Remand, therefore, does not affect the Hearing Officer’s decision in this matter as it relates to reciprocal compensation for ISP-bound traffic prior to the effective date of the Order on Remand. However, after that date, such payment will be subject to the interim regime imposed by the FCC.

IT IS THEREFORE ORDERED THAT:

1. The parties shall treat ISP-bound traffic as local traffic under this Agreement and shall pay reciprocal compensation for such traffic in accordance with the Agreement and the FCC’s *Order on Remand and Report and Order*, CC Docket No. 96-98 and CC Docket No. 99-68, released on April 27, 2001.

2. BellSouth shall immediately pay MCImetro any reciprocal compensation payments due for ISP-bound traffic which it has withheld.

¹¹² *Id.*, ¶ 77, 7.

¹¹³ *Id.*, ¶ 7.

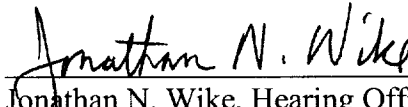
¹¹⁴ *Id.*, ¶ 82. The interim regime becomes effective thirty (30) days from the publication of the Order on Remand in the Federal Register. *Id.*, ¶ 112.

3. BellSouth shall pay MCImetro reciprocal compensation for all ISP-bound and other local traffic at the switching rate applicable to the switching actually performed.

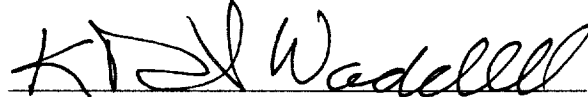
4. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.

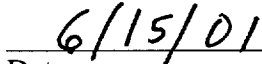
5. Any party aggrieved by the decision of the Hearing Officer in this matter may also file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

6. In the event this Order is not appealed to the Directors of the Tennessee Regulatory Authority within fifteen (15) days, this Order shall become the Final Order and shall be effective from the date of entry. Thereafter, any party aggrieved by the Authority's Final Order in this matter has the right to judicial review by filing a Petition for Review with the United States District Court.


Jonathan N. Wike, Hearing Officer

ATTEST:


K. David Waddell, Executive Secretary


Date